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After Midnight: The Constitutional Status of Juvenile Curfew Ordinances in California

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NOTES

After Midnight: The Constitutional Status of Juvenile Curfew Ordinances in California

By SUSAN L. FREITAS*

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* Member, Third Year Class; B.A. 1993, University of California, Davis. I would like to thank my mother, Dr. Alberta Freitas, and my father, Frank Freitas, for their unfailing encouragement and support. I am also especially grateful to Joe Eandi for his critical questioning and thoughtful comments in the development of this Note, as well as his enduring enthusiasm and motivation. Finally, thanks to Jason Palm for his numerous suggestions and tireless edits and to Karen Meckstroth for her empathy and insight.

This Note is dedicated to my mother who has devoted her life to educating children, and in the process has become an inspiration to those around her.

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I. Introduction

We're gonna cause talk and suspicion; We're gonna give an exhibition. We're gonna find out what it's all about. After midnight we're gonna let it all hang down.¹

Imagine standing on a sidewalk, talking with four friends. It is around 11 p.m. on a Saturday night. A police officer who has been watching your group for a few seconds approaches. The officer asks your age. You truthfully respond, "Fifteen." Immediately, the officer places you under arrest, handcuffs you, and proceeds to conduct a search.²

Can a person be arrested for standing in public solely on the basis of his or her age? In the majority of American cities that have implemented a juvenile curfew, the answer is yes.³ In California, juvenile curfews have grown in popularity, but the California Supreme Court

1. ERIC CLAPTON, *After Midnight*, on ERIC CLAPTON (Polygram 1970).

2. These are the facts of *In re Daniel W.*, 41 Cal. Rptr. 2d 202, 204 (Cal. Ct. App. 1995), *review granted*, 900 P.2d 600 (1995), *review dismissed*, 909 P.2d 328 (1996). Once a case is accepted for review by the California Supreme Court, it cannot be cited as legal precedent unless the court orders it republished. *See* CAL. CT. R. 976(d) (West 1996). Upon vacating its order granting review, the court explicitly refused to republish the lower court's opinion. *See In re Daniel W.*, 909 P.2d at 328. Accordingly, the case is used here not as legal precedent, but as a sample fact pattern for juvenile curfews.

3. William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 353-54 (1995) (finding that, based upon a statistical survey, juvenile curfew ordinances exist in 77% of major American cities, and that 44% of them were enacted after 1989). For example, the Bakersfield curfew ordinance under which Daniel was arrested states:

It is unlawful for any person under the age of eighteen years to loiter upon the streets of the city, in places of amusement or entertainment, or in other public places within the city, between the hours of ten p.m. and five a.m., of any day unless such person is accompanied by a parent, guardian or other adult person having control or charge of such person under eighteen years; or unless such person under the age of eighteen years has gone to a place of entertainment or amusement other than one at which liquor is sold or served, prior to eight p.m., where a regular program of entertainment has commenced or been arranged for the occasion to commence prior to eight p.m., and has held over or been continued beyond ten p.m., or such person has left such a place, a place of employment or social call after ten p.m., and such person is thereafter returning directly to his/her home or place of residence in a reasonable manner.

In re Daniel W., 41 Cal. Rptr. 2d at 205 (quoting BAKERSFIELD, CAL., MUNICIPAL CODE § 9.44.010 (1995)).

has yet to rule on their legality.⁴ The court initially granted review of *In re Daniel W.*,⁵ promising a definitive decision on the general constitutionality of municipally imposed juvenile curfews in California. However, the court dismissed Daniel's case five months later for failure to raise the constitutional issue at the trial court level.⁶ As a result, Californians must continue to wait for a definitive answer on the constitutionality of such curfew ordinances.

To date, even as juvenile curfew ordinances proliferate at the local level, scholarly commentary on juvenile curfews in California has been minimal. This Note addresses the continuing constitutional problems presented by juvenile curfew ordinances, particularly in relation to current California law. Part II examines the general history of the juvenile curfew in the United States and explores the bases for challenging such curfews under the United States Constitution. Part III analyzes the recent growth of juvenile curfew ordinances in California and the current status of applicable California law. Finally, in light of the dismissal of *In re Daniel W.*, Part IV proposes an alternative approach to the implementation of juvenile curfew ordinances in California.

II. Juvenile Curfew Law in the United States

A. The Origin and Evolution of Curfews

Curfews are a mechanism of social control. Throughout history, curfews have been enacted when powerful factions of society perceive the imminent loss of control over less powerful citizens. Each time,

4. The constitutionality of juvenile curfews has been addressed in only two cases at the intermediate appellate level in California and one case at the superior court appellate level. Compare *In re Nancy C.*, 105 Cal. Rptr. 113 (Cal. Ct. App. 1972) (holding a Sacramento juvenile curfew ordinance to be constitutional), and *People v. Walton*, 161 P.2d 498 (Cal. App. Dep't Super. Ct. 1945) (holding a Los Angeles juvenile curfew ordinance to be constitutional), with *Alves v. Justice Court*, 306 P.2d 601 (Cal. Ct. App. 1957) (holding a Chico juvenile curfew ordinance to be an unlawful invasion of personal rights and liberties, and thus unconstitutional).

California courts have also addressed the legality of arrests made on the basis of curfew violations without ruling on the constitutionality of the juvenile curfew ordinance. See, e.g., *In re Arthur J.*, 238 Cal. Rptr. 523, 527 (Cal. Ct. App. 1987) (holding that the officer's mistake regarding the hours covered by the juvenile curfew ordinance resulted in the arrest of the minor without probable cause); *In re Francis W.*, 117 Cal. Rptr. 277, 282 (1974) (holding that the officer's suspicion that the juveniles were violating the curfew ordinance was reasonable, and thus justified the initial detention); *People v. Horton*, 92 Cal. Rptr. 666, 668 (1971) (holding that the officer's reason for stopping a car [because it was 1:15 a.m. and there were two minors in the car] did not justify the stop).

5. 900 P.2d at 600.

6. *In re Daniel W.*, 909 P.2d at 328.

the members of a group lacking any substantial power and rights become the scapegoats.

There are two analytical types of curfews. The distinction between them has been crucial in determining the legal ramifications of governmentally-imposed curfews on constitutional rights. The blanket or nonemergency curfew is broader in scope and breadth than the more exacting, reactionary, emergency curfew.⁷ Examples of various emergency and nonemergency curfews are readily found in history. The first curfew regulations have been traced to the ninth century, when William the Conqueror used curfews to keep English citizens off of the streets in an effort to prevent them from gathering together.⁸ In the United States, prior to the abolition of slavery in 1865, curfews were used to designate times when African-Americans could be on the streets.⁹ At the turn of the century, as cities experienced an unprecedented influx of immigrants, nonemergency, blanket curfews aimed specifically at juveniles emerged.¹⁰ Enforcement of curfews waned until the 1940s when the onset of World War II heightened the country's need for a sense of control.¹¹ During this period, not only were emergency curfews imposed upon citizens of Japanese ancestry,¹² but a perceived need to control juveniles whose parents were in the armed services or working (often at night) in war plants also re-

7. Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL OF RTS. J. 949, 951 (1996).

8. See *Thistlewood v. Trial Magistrate*, 204 A.2d 688, 690 (Md. 1964).

9. See *id.* Katherine Hunt Federle has analogized the various restrictions placed upon African-Americans before the Civil War to the paternalistic treatment afforded children:

The experience of African Americans teaches us that rights must be able to challenge existing hierarchies to have value; yet the rights we accord children do little more than insure their powerlessness. Nor may we claim that children benefit from our paternalism, for children, like slaves, are disadvantaged by such accounts.

Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1340-44 (1995).

10. See *Thistlewood*, 204 A.2d at 691; see also Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66, 66-68 & n.5 (1958) (discussing the development of juvenile curfews at the turn of the century resulting from society's fear that immigrants would not control their children).

11. See *Thistlewood*, 204 A.2d at 691.

12. The United States Supreme Court held that emergency curfews directed at United States citizens of Japanese ancestry were constitutional exercises of the emergency war powers. See *Yasui v. United States*, 320 U.S. 115, 117 (1943) (holding that the curfew ordinance was valid regardless of citizenship); *Hirabayashi v. United States*, 320 U.S. 81, 91-92, 101 (1943) (holding that the executive order authorizing curfew orders as an emergency war measure and requiring all persons of Japanese ancestry to abide by the curfew was constitutional).

sulted in the re-emergence of blanket juvenile curfews.¹³ The enforcement of curfews declined after the War, but, during the civil riots of the late 1960s and early 1970s, emergency curfew ordinances aimed at the general public resurged and were generally upheld as legitimate exercises of the emergency power.¹⁴

During this period of civil unrest in America, the approach to juvenile delinquency took an abrupt turn away from blanket curfews. For example, the Board of Trustees of the National Council on Crime and Delinquency urged the repeal of juvenile curfew ordinances because curfew enforcement was found to be ineffective and discriminatory.¹⁵ Blanket curfews are inherently broad in their coverage, in contrast with emergency curfews, which are limited in application and duration. Whereas emergency curfews have survived constitutional attacks because they are a narrowly tailored means of addressing specific emergency situations,¹⁶ blanket curfews have no such redeeming quality.¹⁷ As applied to juveniles, modern blanket curfews tend to incorporate exceptions in an effort to limit their intractable scope and breadth, thereby passing constitutional muster.¹⁸ Because such exceptions in blanket juvenile curfew ordinances have not always been successful in curing constitutional defects,¹⁹ proponents have attempted to reclassify them as emergency curfews.

13. See *Thistlewood*, 204 A.2d at 691.

14. See, e.g., *United States v. Chalk*, 441 F.2d 1277, 1283 (4th Cir. 1971) (stating that a "nighttime curfew is an effective means of controlling or preventing imminent civil disorder," and thus holding that a curfew ordinance enacted during a state of emergency was valid); *State v. Boles*, 240 A.2d 920, 926 (Conn. Cir. Ct. 1967) (holding that a curfew imposed during a state of emergency, in this case a riot, was constitutional); *Glover v. District of Columbia*, 250 A.2d 556, 559, 561-62 (D.C. 1969) (holding that an emergency curfew promulgated in response to "rioting, looting, and burning" was constitutional).

15. See *Ruefle & Reynolds*, *supra* note 3, at 347.

16. See *supra* notes 12, 14.

17. *Trollinger*, *supra* note 7, at 955.

18. Typical exceptions to blanket juvenile curfews include the following: accompaniment by a parent or other authorized adult; travel between home and place of employment, worship, or municipal or school function; emergency errands relating to the health of a family member; remaining on the sidewalk in front of the minor's home or the home of a neighbor. See *Waters v. Barry*, 711 F. Supp. 1125, 1135 (D.D.C. 1989); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1246-47 (M.D. Pa. 1975); *Qutb v. Strauss*, 11 F.3d 488, 490 (5th Cir. 1993).

19. Despite the existence of stated exceptions to the application of blanket juvenile curfews in the ordinance, courts have found curfews violative of fundamental rights, vague, and overbroad. See, e.g., *Waters*, 711 F. Supp. 1135-36 ("Yet it is what these curfews restrict, and not what they exempt that matters most."); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1383 (D.N.H. 1984) ("[T]he ordinance, despite its exceptions, sweeps a broad range of innocent behavior into the category of prohibited conduct.").

During the last twenty years, as competing policy agendas have emerged stressing a crime-control approach to juvenile justice,²⁰ proponents of juvenile curfews argue that they are necessary to protect the safety of children and the community.²¹ Yet, studies have found no definitive correlation between implementation of juvenile curfews and reduction in juvenile crime.²² Nevertheless, the public has recognized a crisis in the form of serious delinquency and gang violence and has demanded appropriate action.²³ Inevitably, this recognized crisis has resulted in the recasting of juvenile curfews as emergency, rather than nonemergency, blanket curfews. As the increase in the number of cities enacting juvenile curfews suggests, this crime-control approach seems to be winning adherents.²⁴

B. The Scope of Juveniles' Constitutional Rights

Across the nation, courts have begun to realize that the antiquated legal fiction that childhood is a condition "continuing from the age of birth to the age of majority, at which time the young person is presumed to be capable of responsible adult decision making" has se-

20. See Ruefle & Reynolds, *supra* note 3, at 348.

21. See *id.* at 349. Ruefle and Reynolds explain the logic behind such curfews as follows:

In high-crime communities, curfews are a means to protect non-delinquent youth from crime and to deny delinquent youth the opportunity to engage in crime. In low-crime communities, they provide the police with the means to disperse late-night crowds of juveniles, to stop and question youths during curfew hours, and, if necessary, to keep youths off the streets.

Id.

22. See *Waters*, 711 F. Supp. at 1125; see also Nell Burnstein, *In by Midnight: California Brings on a New Wave of Youth Curfews*, CAL. LAW., Nov. 1994, at 25 (describing the only scientific study to measure the effectiveness of juvenile curfews, which found that even though fewer juveniles were arrested during curfew hours, the number of juveniles arrested in the afternoon increased).

23. See Ruefle & Reynolds, *supra* note 3, at 361.

24. See *id.* at 360-61. However, attempts at reclassification of blanket juvenile curfews as emergency curfews have ultimately failed due to the lack of factual information evidencing the "emergency" status of juvenile crime and the required breadth of juvenile curfews necessary to effectuate reductions in such crime. Trollinger addresses this reality and concludes that:

[T]he "emergency" blanket curfew law poses at the very least a constitutional conundrum. Legitimate emergency curfews tend to be constitutional, while blanket curfews can only very rarely and under the most extreme circumstances survive constitutional scrutiny. The blanket law possesses many of the determinative elements of an emergency curfew, but is, within its operative geographical area and personal effect, blanket in application. Thus, it can be constitutional if and only if it possesses all or most of the characteristics that render constitutional the narrowly confined emergency curfew while possessing few or none of the characteristics that render unconstitutional the blanket law.

Trollinger, *supra* note 7, at 960 (footnotes omitted).

vere logical failings.²⁵ The Supreme Court has expressly rejected this notion in a case involving a minor's right to privacy, declaring that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."²⁶

Furthermore, in upholding the due process rights of minors, the Supreme Court has declared that "whatever may be their precise import, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."²⁷ The Court has also stated that minors "are entitled to a significant measure of First Amendment protection."²⁸ In light of the Supreme Court's recognition that the First Amendment rights of minors include the freedoms of speech, expression, and religion,²⁹ recognition of minors' rights to assemble and associate should naturally follow.³⁰

However, the Supreme Court has not yet held that the constitutional rights of minors are coextensive with the rights of adults. Instead, the Court has maintained that the state has greater power to restrict the rights of children.³¹ Thus, while acknowledging that "a child, merely on account of his minority, is not beyond the protection of the Constitution,"³² the Court has simultaneously held fast to paternal authoritarianism over the conduct of juveniles.

25. ROBERT M. HOROWITZ & HOWARD A. DAVIDSON, *LEGAL RIGHTS OF CHILDREN* 116 (1984).

26. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

27. *In re Gault*, 387 U.S. 1, 13 (1967). Lower courts have increasingly followed the Supreme Court's lead, holding that minors are no less deserving of constitutional protections than are adults. *See, e.g., Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989) ("The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society."); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1384 (D.N.H. 1984) (finding that juveniles have a personal liberty interest in freedom of movement); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) ("It is too late in the day to say that minors do not have constitutional rights under the federal Constitution.").

28. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975).

29. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that minors enjoy the right of free expression); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that minors enjoy the rights of freedom of religion and expression).

30. Arizona has found that minors have these rights. *See In re Juvenile Action No. JT9065297*, 887 P.2d 599, 605 (Ariz. Ct. App. 1994).

31. *See Note, Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1167 (1984).

32. *Bellotti v. Baird*, 433 U.S. 622, 633 (1979).

In *Bellotti v. Baird*,³³ the Supreme Court described three specific reasons why children may be viewed differently from adults under the Constitution: "the particular vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children."³⁴ Even though this measure of children's rights on the basis of their lack of maturity, judgment, and choice has been duly criticized,³⁵ it "continues to pervade the law and profoundly affects the social and legal world in which children live."³⁶

Proponents of juvenile curfews respond to the Court's justifications in *Bellotti* enthusiastically and with arguments in favor of government intervention in the control of juvenile conduct. Based on propositions that curfews are an effective tool in preventing victimization of children, imposing parental responsibility, and repairing the deterioration of the American family, juvenile curfew proponents staunchly support the rationale and effect of the *Bellotti* factors.³⁷

On the opposing side of the debate are arguments that curfew laws not only epitomize the use of law as a mechanism for social control, but additionally "they are inefficacious, they burden scarce police resources, and they unconstitutionally restrict liberty."³⁸ Essentially, juvenile curfews are cosmetic solutions to a much deeper problem.³⁹ Opponents of juvenile curfews further argue that, conceptually, cur-

33. 433 U.S. 622 (1979).

34. *Id.* at 634. In *Bellotti*, the Court addressed the constitutionality of a Massachusetts statute requiring parental consent before a minor can obtain an abortion. Considering the proposition that age does not remove a child from the sphere of constitutional protection to be a mere departure point for the constitutional analysis, the Court recognized that "the status of minors under the law is unique in many respects" and thus "requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* at 633, 634. Therefore, although the Court determined that minors generally have the same constitutional rights as adults, the Court declared that the "State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Id.* at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

35. See Federle, *supra* note 9, at 1319-25.

36. Note, *supra* note 31, at 1168.

37. See Trollinger, *supra* note 7, at 961-62; see also Patrick Hoge, *Families of 2 Slain Boys File Claim, Blame Officer*, SACRAMENTO BEE, Mar. 29, 1994, at B1 (relating the murder of two boys, ages 12 and 13, who were stopped while walking on a busy boulevard at 2:15 a.m. by a police officer and told to go home; the officer did not enforce the juvenile curfew, and the boys' bodies were found a few hours later).

38. See Trollinger, *supra* note 7, at 964 (footnote omitted).

39. Raquel Moreno & Jose Pavon, *Curfew Would Target Minorities*, S.F. CHRON., Nov. 6, 1995, at A21 (arguing that a proposed San Francisco curfew is a mere "Band-Aid" measure and a costly "scapegoating policy" which fails to address the root causes of juvenile crime and makes youths, particularly minorities, police targets).

fews are ineffective because they do not deter those juveniles who intend to break the law, and they assume that the governmental imposition of curfews will effectuate parental responsibility where it is lacking.⁴⁰

Courts have, however, applied the rationale articulated by the Supreme Court in *Bellotti*, albeit inconsistently.⁴¹ Possibly for lack of more specific authority or to justify a predetermined outcome, some courts have used the *Bellotti* factors in curfew cases "to prove that minors do not possess fundamental rights," thus inverting the constitutional analysis.⁴² As a result, although one state supreme court has stated that "[r]estricting movement . . . to the extent that First Amendment rights cannot be exercised without violating the law is equivalent to denial of those rights,"⁴³ restrictions upon, and regulations of, minors' constitutional rights have often been justified by characteristics inherent in childhood.⁴⁴

The scope of children's rights is clearly limited. The proliferation of blanket juvenile curfews directly evidences our society's concern for the protection of juveniles against violent crime and the protection of the community from juvenile crime, as well as the resurrection of the American family and parental responsibility. Although not entirely satisfactory, and certainly not a legitimate or wise basis for the justification of juvenile curfews, many courts have relied upon the characteristics inherent in childhood as the rationale to support government intervention in the innocent activity of juveniles. The easy escape offered by such reasoning could not be more disturbing for a

40. See Trollinger, *supra* note 7, at 966.

41. See, e.g., *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) ("[A]ctivities of . . . minors may be treated differently from [those of] adults."); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975) ("[Minors' activities may be] constitutionally regulated to a greater extent than [those] of adults."); *Allen v. City of Bordentown*, 524 A.2d 478, 485 (N.J. Super. Ct. Law Div. 1987) (finding that the First Amendment "rights of children . . . can be diminished in appropriate circumstances"); *City of Eastlake v. Ruggiero*, 220 N.E.2d 126, 128 (Ohio Ct. App. 1966) (recognizing that activities and conduct of minors may be regulated to a greater extent than those of adults).

42. Trollinger, *supra* note 7, at 990 (emphasis added)(footnote omitted); see also *infra* note 76 and accompanying text.

43. *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992).

44. See Note, *supra* note 31, at 1168 for an analysis of the rights of minors as persons and the justifications utilized by the courts in limiting these rights. But see *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981) (stating that the *Bellotti* factors do not apply where "no issue of particular vulnerability of children is presented"); *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (summarizing the *Bellotti* factors as "emphasizing the special vulnerability of children," but finding them inapplicable "where the innocent behavior of the juvenile create no risk of delinquent activity").

country presumably predicated on the equal application of constitutional rights to all citizens.

C. Three Traditional Bases for Challenging Juvenile Curfews

1. *The Dual Approach to Equal Protection Challenges—Rational Basis and Strict Scrutiny*

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated persons be treated alike.⁴⁵ Accordingly, if a government action classifies or distinguishes between groups of people, an equal protection inquiry will be undertaken by the court when considering the classification.⁴⁶ If the government action disadvantages a "suspect class"⁴⁷ or infringes upon a "fundamental right,"⁴⁸ the strict scrutiny test is applied.⁴⁹ Conversely, if the government action does not disadvantage a suspect class nor infringe upon any fundamental right, it will be subject to the less stringent rational basis test.⁵⁰

Application of the rational basis test to a juvenile curfew ordinance would require the court to determine whether the ordinance bears a rational relationship to the purposes sought to be achieved.⁵¹ The state need only establish a legitimate state objective to justify the curfew, and then show that there is a rational relationship between the ordinance and that objective.⁵² Additionally, legislative judgment is traditionally accorded wide discretion—it receives "the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious."⁵³

45. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

46. See *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

47. A "suspect class" is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

48. Fundamental rights are defined as those rights which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see also *infra* notes 57-64 and accompanying text.

49. See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

50. See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28, 34, 40. The third level of equal protection review, intermediate scrutiny, is not relevant in this context as it is limited in application to challenges of gender-based classifications. See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

51. See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

52. See *Schall v. Martin*, 467 U.S. 253, 256-57 (1984) (applying the rational basis test and holding that a state statute allowing pretrial juvenile detention served a legitimate state objective and satisfied due process requirements through its procedural protections).

53. *McLaughlin*, 379 U.S. at 191.

Therefore, it is likely that a blanket, nonemergency juvenile curfew would easily withstand the lenient, deferential rational basis test.

The strict scrutiny test is much more demanding. The survival of a juvenile curfew under the strict scrutiny test is dependent upon a compelling government interest, the necessity of the curfew to uphold that interest, *and* the requirement that the curfew is narrowly tailored to achieve that interest.⁵⁴ In challenging the constitutionality of juvenile curfews, the minor cannot rely on the age-based classification to trigger strict scrutiny because the Supreme Court has held that "age is not a suspect classification."⁵⁵ However, where age discrimination implicates a fundamental right, it is subject to strict scrutiny.⁵⁶ Accordingly, the application of strict scrutiny to a juvenile curfew requires the juvenile to show that the government action infringes upon his or her fundamental rights. In order to have a juvenile curfew ordinance declared unconstitutional, strict scrutiny must be triggered via the fundamental rights inquiry because the rational basis test would not be a challenging hurdle in this context.

The Supreme Court has found most of the rights protected by the First Amendment⁵⁷ and the Fourteenth Amendment⁵⁸ to be fundamental including the following: free exercise of religion;⁵⁹ the rights of political expression and political association;⁶⁰ freedom of association for the advancement of economic, religious, or cultural matters;⁶¹ the right to peaceful assembly;⁶² freedom of movement;⁶³ and the general right of privacy.⁶⁴ Courts have found that juvenile curfews implicate a variety of fundamental rights under both the First and Fourteenth Amendments.⁶⁵ Consequently, since curfews exclusively

54. See Natalie M. Williams, Comment, *Updated Guidelines for Juvenile Curfews: City of Maquoketa v. Russell*, 79 IOWA L. REV. 465, 477 (1994).

55. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

56. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

57. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

58. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

59. See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

60. See *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

61. See *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

62. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

63. See *United States v. Wheeler*, 254 U.S. 281, 293 (1920).

64. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

65. See *infra* notes 92-98 and accompanying text.

affect minors, they must be narrowly tailored to achieve a compelling government interest.⁶⁶

Should the Court find that a juvenile curfew ordinance promotes a compelling government interest, the court would next determine whether the ordinance is narrowly tailored to achieve that interest.⁶⁷ Contrarily, if the court were to find that the government interest in the curfew was not compelling enough to justify the infringement on the fundamental rights of the minors affected, the analysis would end and the ordinance would be declared unconstitutional.⁶⁸ An ordinance is narrowly tailored if there is a close nexus between the government's asserted interest and the classification created by the ordinance.⁶⁹ Thus, the curfew would be declared unconstitutional if it was not the least restrictive means available to accomplish the stated goals.⁷⁰

The requirements of the strict scrutiny test are demanding and "legislation subjected to strict scrutiny analysis is rarely upheld."⁷¹ Accordingly, it would be crucial for a minor challenging the constitutionality of a juvenile curfew ordinance that the court find infringement of a fundamental right and apply the strict scrutiny test, rather than the rational basis test. Unfortunately, the Supreme Court has not been able to decide which test to apply: "[T]he Court's decisions reflect both a persistent unwillingness to engage in traditional strict scrutiny analysis and a continuing recognition that children's rights deserve considerably more protection than that offered by the rational relation test"⁷²

Although some courts have used the *Bellotti* factors⁷³ to determine whether to apply strict scrutiny in reviewing the constitutionality

66. It has also been suggested that juvenile curfews create a classification between "law-abiding adults and law-abiding youth" which "cannot possibly withstand even minimal constitutional scrutiny." Trollinger, *supra* note 7, at 1001.

67. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

68. See *id.*

69. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (explaining that this test "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate").

70. See *Waters v. Barry*, 711 F. Supp. 1125, 1135 (D.D.C. 1989) (recognizing the compelling interest in curbing juvenile crime, but stating that "[r]ather than a narrowly drawn, constitutionally sensitive response, the District has effectively chosen to deal with the problem by making thousands of this city's innocent juveniles prisoners in their own homes").

71. Sam R. Hananel, Note, *Recent Development: Qutb v. Strauss: The Fifth Circuit Upholds a Narrowly Tailored Juvenile Curfew Ordinance*, 69 TUL. L. REV. 308, 309 (1994).

72. Note, *supra* note 31, at 1169.

73. See *supra* note 34 and accompanying text.

of juvenile curfews,⁷⁴ the precise impact of *Bellotti* on the issue of juvenile curfews is far from clear.⁷⁵ Courts have taken various approaches. At least one court has used the *Bellotti* factors as justification for shifting from a strict scrutiny analysis to a rational basis test based on its determination that children's rights are less important than those of adults.⁷⁶ Other courts have used the *Bellotti* factors to determine whether the state interest is compelling enough to override the minors' constitutional interests.⁷⁷ Finally, several courts have determined that application of the *Bellotti* factors was unnecessary.⁷⁸

As the Supreme Court has yet to review a juvenile curfew case,⁷⁹ this inconsistent use of the *Bellotti* factors by lower courts in juvenile curfew cases will likely continue. Although the most obvious classification used by blanket juvenile curfews, age, is not suspect under an equal protection analysis, discrimination based upon age implicates the infringement of fundamental rights, triggering a strict scrutiny analysis of the juvenile curfew ordinance.

2. *Procedural Due Process and the Vagueness Doctrine*

Beyond the equal protection inquiry, juvenile curfews face alternative constitutional challenges based upon violation of protections guaranteed under the Due Process Clause of the Fourteenth Amendment. As a threshold matter, juvenile curfews must provide notice of

74. See, e.g., *Waters*, 711 F. Supp. at 1137 n.25 ("[*Bellotti* represents] the Court's only reasoned discussion to date of the possible bases for distinguishing minors' constitutional rights from adults . . . [and] is generally cited as controlling in cases addressing the constitutionality of juvenile curfew statutes.").

75. See *Williams*, *supra* note 54, at 478-80 & n.115 ("Whether the concerns recognized in *Bellotti* 'should apply outside of the abortion rights context is unclear.'" (quoting Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of a New Standard*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 169 (1992))); see also *supra* text accompanying notes 41-44.

76. See *In re J.M.*, 768 P.2d 219, 223 (Colo. 1989) (determining that a minor's fundamental rights of freedom of movement and travel are not co-extensive with those of adults, and applying the rational basis test to the juvenile curfew ordinance).

77. See, e.g., *Waters*, 711 F. Supp. at 1137. At least one court has determined that, based upon the *Bellotti* factors, the state's interest in protecting children and the family is sufficient to survive strict scrutiny. See *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992).

78. See, e.g., *McColleston v. City of Keene*, 586 F. Supp. 1381, 1386 (D.N.H. 1984) (emphasizing that the *Bellotti* factors "do not come into play where the innocent behavior of the juvenile creates no risk of delinquent activity"); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1073 (5th Cir. 1981) (concluding that a *Bellotti* inquiry was not necessary as "none of the three factors . . . applies [sic] to overly broad restrictions").

79. The United States Supreme Court has denied certiorari on the only two curfew cases to come before it: *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2134 (1994); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

prohibited or required activity; a curfew ordinance necessitating people of common intelligence to guess at its meaning is void for vagueness.⁸⁰ Secondly, a juvenile curfew must provide for an explicit method of enforcement; failure "to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact, and others whose obligation it is to enforce, apply and administer the penal laws" offends due process.⁸¹ The notions behind the vagueness doctrine are thus deeply rooted in the tenets of procedural due process, requiring fair notice and specific guidance.⁸²

Incorporating these principles, the Supreme Court has developed a two-part test: "the statute or ordinance must (1) give a person of ordinary intelligence fair notice of what is prohibited; and (2) provide an explicit standard for officers enforcing it."⁸³ Juvenile curfews which are unclear in their meaning and indefinite in their application may potentially result in arbitrary enforcement, thereby violating a minor's procedural due process protections.⁸⁴ For example, a vague juvenile curfew ordinance could permit arrests of minors for curfew violations when they are exercising protected First Amendment rights.⁸⁵ Additionally, and perhaps even more unacceptably, the integration of warning mechanisms in juvenile curfews potentially strips juveniles of procedural due process by leaving the decision to warn or arrest entirely with police officers.⁸⁶ Thus, where the language of a juvenile curfew ordinance does not provide notice of the precise scope

80. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

81. *Bowers v. State*, 389 A.2d 341, 345 (Md. 1978).

82. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

83. See *City of Panora v. Simmons*, 445 N.W.2d 363, 366 (Iowa 1989) (citing *Kolender*, 461 U.S. at 357).

84. See, e.g., *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (holding a juvenile curfew ordinance void for vagueness for failure to state the hour when the curfew ends); *Ashton v. Brown*, 660 A.2d 447, 460 (Md. 1995) (finding the words "bona fide organization" unconstitutionally vague); *K.L.J. v. State*, 581 So. 2d 920, 922 (Fla. Dist. Ct. App.) (holding the term "legitimate purpose" to be vague); *City of Seattle v. Pullman*, 514 P.2d 1059, 1063 (Wash. 1973) (finding the words "loiter, idle, wander or play" void for unconstitutional uncertainty); see also *Federle*, *supra* note 9, at 1358-59 (providing examples of phrases that lack the requisite clarity to meet a vagueness challenge).

85. See *K.L.J.*, 581 So. 2d at 922 (holding that a juvenile curfew ordinance that was not narrowly tailored and did not provide sufficient notice of what conduct it prohibited was unconstitutionally overbroad and vague because it could potentially be applied in such a way "which would infringe on the basic rights guaranteed by the United States and Florida Constitutions").

86. See *Trollinger*, *supra* note 7, at 975-76. Warning mechanisms in juvenile curfews function as a predicate to arrest and prosecution, but are inherently unworkable. Through a warning mechanism in which, for example, a juvenile curfew violator is accorded three warnings before being arrested, the officer who finds a juvenile in violation of curfew becomes "prosecutor, judge, and jury." *Id.* at 976.

of the prohibition and is therefore likely to encourage arbitrary enforcement, it is void for vagueness.

3. *Substantive Due Process and the Overbreadth Doctrine*

The overbreadth doctrine is so closely related to the void for vagueness doctrine that the concepts often merge.⁸⁷ While the specific language of a curfew may not be vague, if a literal application of the curfew infringes upon fundamental rights, it is necessarily overbroad.⁸⁸ The unreasonable infringement upon a minor's First or Fourteenth Amendment rights triggers an overbreadth analysis.

If the sweep of a juvenile curfew ordinance is greater than necessary, such that a more narrowly drawn provision will accomplish the same purpose with a less substantial effect on freedoms protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment, the ordinance is overbroad.⁸⁹ Upon determining that a constitutionally protected right or liberty interest is at stake,⁹⁰ the court would apply a strict scrutiny analysis, under which the juvenile curfew ordinance would only pass constitutional muster if the state could show that it was narrowly drawn to further a compelling interest.⁹¹

Courts applying the overbreadth doctrine to juvenile curfews have enumerated various personal liberty interests upon which juvenile curfew ordinances infringe.⁹² In addition to the possible deleterious effects of juvenile curfews on substantial due process protections by criminalizing innocent activity,⁹³ courts have most often found curfews to be overbroad because they restrict minors' "freedom of move-

87. See Williams, *supra* note 54, at 472.

88. See, e.g., *McColleston v. City of Keene*, 586 F. Supp. 1381, 1383-84 (D.N.H. 1984); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1071-72 (5th Cir. 1981).

89. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

90. See *McColleston*, 586 F. Supp. at 1384.

91. See *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242, 1264-65 (M.D. Pa. 1975).

92. See Williams, *supra* note 54, at 473-75.

93. For an analysis of the possibility that juvenile curfews may infringe on juveniles' fundamental rights through the criminalization of innocent activity, see Trollingier, *supra* note 7, at 977-78. Trollingier concludes that:

Vesting in governmental instrumentalities the authority to deprive persons of freedom to engage in innocent conduct is a frightening proposition. The Due Process Clause should proscribe such a result. Once innocence can be the subject of arrest and criminal prosecution, the concept of due process evaporates. Arguably, therefore, the substantive component of the Due Process clause makes even the most carefully drafted blanket law unconstitutional.

Id. (footnote omitted).

ment."⁹⁴ Additionally, courts have found blanket juvenile curfews to be restrictive of the freedoms of speech, association, peaceful assembly, and religion.⁹⁵

Although freedom of movement is not one of the enumerated liberties, it has been interpreted as a fundamental right, inclusive of walking, strolling, wandering, and loafing, all of which are "historically part of the amenities of life as we have known them."⁹⁶ Thus, whether classified as a fundamental right protected by the Due Process Clause,⁹⁷ or as a right incidental to First Amendment freedoms,⁹⁸ any infringement upon free movement will be found unconstitutionally overbroad if it is not sufficiently narrowly tailored.⁹⁹

Although various rights and constitutional tests are implicated by blanket juvenile curfews, the ultimate issue of the constitutionality of juvenile curfews remains unanswered. Potentially, it may be impossible for a juvenile to successfully challenge a blanket juvenile curfew in the evident paternalistic environment of our society and the pervasive resignation to viewing children as less deserving and less capable of possessing the full panoply of constitutional rights. Nonetheless, the tools of attack are in place.

Blanket (nonemergency) juvenile curfews necessarily spurn the rights of equal protection, substantive, and procedural due process. On their face, blanket juvenile curfews discriminate against juveniles based solely on age, infringing upon the fundamental rights of freedom of religion, expression, association, privacy, and movement. The

94. See Williams, *supra* note 54, at 471 & n.61.

95. See *id.* at 470-71.

96. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

97. See, e.g., *Bykofsky*, 401 F. Supp. at 1254 ("The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are basic values 'implicit in the concept of ordered liberty' protected by the due process clause of the [F]ourteenth [A]mendment.").

98. See, e.g., *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992) ("Whenever the First Amendment rights of freedom of religion, speech, assembly, and association require one to move about, such movement must necessarily be protected under the First Amendment. Restricting movement in those circumstances to the extent that the First Amendment rights cannot be exercised without violating the law is equivalent to a denial of those rights.").

99. See Williams, *supra* note 54, at 473. In two cases where overbreadth challenges to juvenile curfew ordinances were unsuccessful, the ordinances had been narrowly drawn to protect First Amendment rights (that is, exceptions were included). See *Bykofsky*, 401 F. Supp. at 1258 (holding that government interest outweighed the minor's interest in freedom of movement in "circumstances other than those provided for in the numerous curfew exceptions"); *In re J.M.*, 768 P.2d 219, 224 (Colo. 1989) ("[The ordinance] does not prevent minors from exercising their [F]irst [A]mendment rights. Minors are free to attend political meetings, religious services, or other protected activities.").

appropriate level of review is thus strict scrutiny, requiring a substantial government interest to which the curfew is the least restrictive means of accomplishing the purported interest. Unfortunately, the majority of courts faced with a challenge to a blanket juvenile curfew ordinance have undertaken the constitutional analysis from the stereotypical, paternalistic point of view that minors are not full citizens under the Constitution. This view of juveniles as less entitled to constitutional rights than adults is based on characteristics inherent in childhood, which in turn are inappropriately utilized in shoring up the required element of government interest.

With this understanding, the next step is a rational basis review of the government interest and the language of the ordinance. Whether the initial attack is rooted in an equal protection challenge or a due process challenge, the deference to the Legislature combined with the leniency of the application of the rational basis test predicts disaster for the juvenile in most situations. California, particularly, has responded to due process challenges by applying the rational basis test in each of its cases on the issue.

III. The Current Status of Juvenile Curfew Law in California

A. The Proliferation of Juvenile Curfews in California

Although many California municipalities have had juvenile curfew ordinances on the books for years, until fairly recently they were rarely if ever enforced.¹⁰⁰ For example, San Diego has had a juvenile curfew ordinance since 1947, yet it went relatively unenforced until 1994.¹⁰¹ In fact, over a dozen California cities have passed juvenile curfew ordinances in the last few years, including Long Beach, San Jose, Palo Alto, and Sacramento.¹⁰² In 1995, the San Francisco Board of Supervisors approved an ordinance banning anyone sixteen years old or younger from public places between the hours of midnight and 5:00 a.m., unless accompanied by an adult.¹⁰³ This move toward im-

100. See Burnstein, *supra* note 22, at 25.

101. See John Wilkins, *Cross, Parade Issues Among Local Caseload*, SAN DIEGO UNION-TRIB., Oct. 1, 1995, at D1.

102. See Burnstein, *supra* note 22, at 25.

103. See Steven A. Chin, *S.F. Eyes San Jose Curfew Results*, S.F. EXAMINER, Aug. 9, 1995, at A1. Until 1995, San Francisco's juvenile curfew languished in obscurity; it was a relatively unknown and unenforced ordinance which prohibited youths under 14 from being on the streets between midnight and 5 a.m. See Catherine Bowman, *S.F. Voters to Decide on Stricter Youth Curfew*, S.F. CHRON., Nov. 2, 1995, at A13. However, the rising implementation of juvenile curfews throughout California and impending mayoral elections led then-Mayor Frank Jordan to bring a revised curfew ordinance before the Board of

plementing juvenile curfews in California reflects a national trend: an estimated fifty-three major cities across the nation have adopted juvenile curfew ordinances, and many others have strengthened existing ordinances since 1990.¹⁰⁴

The proliferation of curfew ordinances has not gone unnoticed by the California Legislature, which has amended and reorganized the Welfare and Institutions Code to reflect the growing utilization of curfews. Under the current code, a minor who violates a local ordinance "establishing a curfew based solely on age" is classified as a status offender and is eligible to become a ward of the juvenile court.¹⁰⁵ The Legislature has further responded to the increased popularity of curfews by implementing a provision enabling cities, towns, and counties to recoup the administrative and transportation costs associated with enforcing juvenile curfew ordinances.¹⁰⁶ Under this provision, the parents or legal guardian of a second-time curfew violator may be charged for actual costs involved in the incident.¹⁰⁷

Additionally, the Code delineates the procedure to be followed when a police officer suspects a curfew violation. First, the officer may "temporarily detain any minor upon a reasonable suspicion based

Supervisors. The proposal expanded the existing curfew to apply to youths under 18, changed the weeknight curfew to begin at 11 p.m., and proscribed an enforcement procedure in which curfew violators would be held at a general detention center until a parent could be reached. *Id.* In support of his proposal, Mayor Jordan cited the city's interest in protecting young people and avoiding giving them a criminal record. *Id.* He pointed to statistics indicating that in 1994, "three-fourths of all juvenile crime victims were between the ages of 15 and 17" and "17-year-olds were suspects in roughly 30 percent of aggravated assaults and other major crimes committed by juveniles . . . between 11 p.m. and 5 a.m." during that same period. *Id.*

The Board of Supervisors did not adopt the Mayor's proposal, but instead passed a curfew sponsored by one of its members. Clarence Johnson, *Curfew Law Expanded in S.F.: Those Under 17 Must Be Inside by Midnight*, S.F. CHRON., Aug. 8, 1995, at A13. In response, Mayor Jordan brought his proposal before the voters; it was soundly defeated. *San Francisco Election Results*, S.F. CHRON., Nov. 10, 1995, at A26. Thus, San Francisco's current juvenile curfew ordinance as passed by the Board of Supervisors on August 7, 1995, provides as follows: Youths under 17 are prohibited from being on the streets between midnight and 5 a.m., unless they have parental permission; police are required to call parents or guardians of curfew violators and provide translators if necessary before taking the youth to an appropriate facility, such as a residential center close to where he or she was discovered (youths may not be held in any "secure or jail-like facility"); the mayor and the Board may modify the curfew at any time; "a nine-member oversight committee . . . will report to the board to ensure, among other things, that police officers do not abuse their newly acquired curfew powers." Johnson, *supra*, at A13.

104. See Burnstein, *supra* note 22, at 25.

105. CAL. WELF. & INST. CODE § 601(a) (West Supp. 1996).

106. See *id.* § 625.5(e).

107. See *id.*

on articulable facts that the minor is in violation of the ordinance."¹⁰⁸ The officer may then transport the minor to his or her residence.¹⁰⁹ Unless the minor "has a legitimate reason based on extenuating circumstances for violating the ordinance,"¹¹⁰ the violation will be treated as a first violation and the minor will receive a warning citation.¹¹¹

The California juvenile court system currently utilizes curfews as a condition of probation in the more common situation of home supervision release.¹¹² Where it is determined that a twenty-four-hour secure detention is not necessary, the minor may be released to his or her parent or guardian with certain conditions.¹¹³ Curfews that may result in secure detention if violated are prevalent conditions.¹¹⁴ Thus, as cities, towns, and counties in California have expanded utilization of juvenile curfew ordinances, the Legislature has responded by regulating curfews.

B. Existing California Case Law on the Constitutionality of Juvenile Curfew Ordinances

The California Supreme Court has never ruled on the general constitutionality of juvenile curfews,¹¹⁵ and case law addressing the application of particular curfews is scarce, consisting of only three cases—two cases decided at the appellate court level and one case decided at the superior court appellate level. In each of these cases, the court has avoided determining the general constitutionality of juvenile curfews by limiting its inquiry to the reasonableness of the specific ordinance before it.¹¹⁶ Applying the rational basis test to the juvenile curfew ordinance in question, two courts found the particular

108. *Id.* § 625.5(c).

109. *See id.*

110. *Id.*

111. *Id.* § 625.5(d).

112. *See id.* § 628.1 (West 1984).

113. *See id.*

114. *See id.*

115. *See supra* notes 4-6 and accompanying text.

116. *See, e.g.,* *People v. Walton*, 161 P.2d 498, 500 (Cal. App. Dep't Super. Ct. 1945) ("[T]he defendant is not legally privileged here to attack the unconstitutional features of the curfew legislation generally. . . ."); *Alves v. Justice Court*, 306 P.2d 601, 602 (Cal. Ct. App. 1957) ("[Defendant] does not question the right of the city to adopt a curfew ordinance."); *In re Nancy C.*, 105 Cal. Rptr. 113, 118 (Cal. Ct. App. 1972) ("[A]ppellant concedes that a municipal governing body has the power to pass a curfew law")

ordinances to be constitutional,¹¹⁷ while the third court found the ordinance unconstitutional.¹¹⁸

A review of the analytical approaches taken by these three courts is instructional as an academic exercise in the application of the rational basis test and reveals the historically restrictive scope of juveniles' constitutional rights in California. As one of those courts stated:

While no legal precedent arising in this state or in the federal courts construing so-called "Curfew" legislation relating to minors has come to our attention, it is well settled that minors constitute a class founded upon a natural and intrinsic distinction from adults; that legislation particularly applicable to them is necessary for their proper protection and when induced by rational considerations looking to that end its validity may not be challenged.¹¹⁹

California first encountered the issue of the constitutionality of blanket juvenile curfews in 1945. In *People v. Walton*,¹²⁰ the defendant was charged with allowing his sixteen-year-old son "to be and remain on a named public highway between the hours of 9 p.m. and 4 a.m. the next day."¹²¹ In examining the defendant's claim that the curfew ordinance which made it a crime for a parent to allow his child to "remain, stroll upon, use, loiter on or be on any street or public place" past the established curfew hours of 9 a.m. to 4 p.m. was unconstitutional,¹²² the court limited its analysis to the regulatory effect of the ordinance upon the parent-defendant as he lacked standing to challenge the general constitutionality of the curfew ordinance.¹²³

117. See *Nancy C.*, 105 Cal. Rptr. at 120; *Walton*, 161 P.2d at 502.

118. See *Alves*, 306 P.2d at 605.

119. *Walton*, 161 P.2d at 501.

120. 161 P.2d at 498.

121. *Id.* at 500.

122. *Id.* The curfew at issue in this case was actually one component of a triad of ordinances dealing with juvenile curfews. The basic ordinance prohibited:

[A]ny parent, guardian, or other person having the legal care, custody, or control of any minor under the age of sixteen years to allow or permit such minor to remain, stroll upon, use, loiter on or be upon any street or public place between the hours of 9 p.m. and 4 a.m. of the following day, unless accompanied by an adult having care and custody of such minor, or unless the minor had in his possession a permit issued by the sheriff showing the necessity of such minor to so use such street or public place.

Id. The first amendment to the basic curfew ordinance raised the age of a minor from 16 to 18 years. The second amendment modified the prohibitions "to eliminate the inhibitions against any of the included minors who 'strolls upon,' 'uses,' 'or is upon' any street or public place. Acts remaining as offenses are 'who remains or loiters' upon any street, etc., or public place." *Id.*

123. See *id.*

Accordingly, the court initially applied a rational basis test to determine the validity of the ordinance. The court recognized the established rule that "no presumption of invalidity of the statute will obtain; but to the contrary, every intendment will be indulged in favor of its validity,"¹²⁴ and examined several cases in which legislation promoting health, safety, and welfare justified burdens imposed by government regulations. The court concluded that the ordinance was rationally related to the government's interest in protecting minors.¹²⁵

Prior to *Walton*, the only case in any jurisdiction which had dealt specifically with juvenile curfew law was an 1898 Texas case. In *Ex parte McCarver*¹²⁶ the court had essentially held that "a rigid restriction of the right to go upon the streets was an undue invasion of the personal liberty of the citizen."¹²⁷ Nevertheless, the court distinguished *Walton* from *McCarver* because the ordinance challenged in *Walton* was not restrictive of a minor's right to go upon the streets—but merely restricted a minor from remaining or loitering on the streets.¹²⁸ Finally, the court held that, based on the exceptions provided in the curfew ordinance and the necessity to allow the police officer some discretion in determining whether the facts satisfied an exception, the ordinance was not vague or overbroad in violation of due process requirements.¹²⁹ Thus, in the first California case to address the constitutionality of a juvenile curfew, the court ultimately held the ordinance to be reasonably restrictive and not overbroad.

Twelve years after *Walton*, in *Alves v. Justice Court*,¹³⁰ a twenty-one-year-old adult appealed a charge that he "willfully aided and abetted a minor to be in a public place at the hour of 11:30 p.m. in violation of the curfew law" on the grounds that the curfew "unduly and unreasonably interferes with personal rights," and was therefore unconstitutional.¹³¹ The *Alves* court began its analysis with the estab-

124. *Id.* at 501 (citations omitted).

125. *See id.* at 501-12.

126. 46 S.W. 936 (Tex. 1898).

127. *Walton*, 161 P.2d at 502 (construing *McCarver*, 46 S.W. 936).

128. *See id.* The *Walton* court also stated that, since "minors constitute a class founded upon a natural and intrinsic distinction from adults," the Legislature could enact laws rationally related to the necessary protection of minors. *Walton*, 161 P.2d at 501.

129. *See Walton*, 161 P.2d at 502-03.

130. 306 P.2d 601 (Cal. Ct. App. 1957).

131. *Id.* at 602, 604. The juvenile curfew ordinance at issue in this case consisted of two parts; the defendant was charged with violating the second part of the ordinance which makes it unlawful to aid and abet a minor in violating the curfew. The basic curfew prohibited:

[A]ny minor under the age of seventeen years of age to be in or on any public street, park, square, or any public place between the hours of 10:00 o'clock P.M.

lished rule that government may enact legislation which potentially interferes with the liberties of its citizens to protect the general welfare, health, and safety.¹³² However, the *Alves* court stated that "this rule is always subject to the rule of reasonableness in relation to the objects attained."¹³³ In other words, while acknowledging the legislative deference traditionally paid to municipal ordinances, the court also recognized the limitations of such deference.

The court distinguished *Walton* based on the type of the curfew involved. Whereas the ordinance in *Alves* essentially prohibits a juvenile's "presence" in a public place after curfew, the ordinance in *Walton* prohibited a juvenile from "remaining" or "loitering" in a public place after curfew.¹³⁴ More similar in scope was the curfew ordinance in *McCarver* which, unlike that in *Walton*, contained broadly restrictive provisions.¹³⁵ Ultimately, despite the city's interest in "better control of juveniles during the late hours of the night,"¹³⁶ the court determined that the blanket juvenile curfew ordinance was unconstitutionally overbroad in that it would completely preclude minors from engaging in lawful and innocent activity, and the ordinance bore no rational relationship to the purpose of the curfew.¹³⁷

It would be another fifteen years before the next case to address the issue of juvenile curfews would arise in California. By 1972, when *In re Nancy C.*¹³⁸ was decided, case law on juvenile curfews had developed across the nation. Additionally, unlike his predecessors in *Walton* and *Alves*, the appellant in *Nancy C.* was a minor charged with violating the juvenile curfew ordinance, which implicated a potential challenge to the constitutionality of juvenile curfews in general.¹³⁹

However, the court in *Nancy C.* mechanically followed *Alves* and *Walton* in applying the rational basis test, rather than strict scrutiny, based on Nancy C.'s concession that the city had the power to pass the

and 5:00 o'clock A.M. of the following day, except when and where said minor is accompanied by a parent or legal guardian having the care and custody of said minor, or where the presence of said minor in said place or places is connected with, and required by, some legitimate business, trade, profession or occupation in which the minor is engaged.

Id. at 602 (quoting CHICO, CAL., MUNICIPAL CODE § 684(a) (1957)).

132. *Id.* at 603.

133. *Id.*

134. *Id.* at 604.

135. *See id.*

136. *Id.* at 605.

137. *See id.*

138. 105 Cal. Rptr. 113 (Cal. Ct. App. 1972).

139. *See id.* at 116.

curfew ordinance for the purpose of protecting minors.¹⁴⁰ In light of the state interests in protecting children, preventing mischief, and promoting the safety and good order of the community, as well as the relative unimportance of juveniles' interest in being on the streets at night, the court asked "whether the means used, as measured by the words of the ordinance, are so broad as to be unreasonable."¹⁴¹

In analyzing the curfew statutes addressed in prior cases, the court delineated two classifications of curfews— "presence" curfews and "loitering" curfews. "Those proscribing 'presence' or 'being in' particular places have been held unconstitutional,"¹⁴² whereas "[t]hose interpreted as only proscribing 'loitering' or 'remaining' have been held constitutional."¹⁴³ As the juvenile curfew at issue proscribed "loitering, idling, wandering, strolling, or playing,"¹⁴⁴ the court classified the ordinance as of the loitering type.¹⁴⁵

In arriving at a conclusion of constitutionality, the court also noted that the curfew was reasonable in scope because it only applied to juveniles and age is not a suspect class,¹⁴⁶ and the ordinance had "reasonable and comprehensible exceptions."¹⁴⁷ Thus, applying the rational relation test, the court found the blanket juvenile curfew ordinance to be a constitutional restriction on juveniles' rights.

140. *See id.* at 118.

141. *Id.* at 119.

142. *Id.* (citing *Alves*, 306 P.2d 601, and *McCarver*, 46 S.W. 936).

143. *Id.* (citing *Walton*, 161 P.2d 498, and *Thistlewood v. Trial Magistrate*, 204 A.2d 688 (Md. 1964)).

144. *Id.* at 120. The curfew in question provided as follows:

It is unlawful for any minor under the age of eighteen to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, or other public grounds, public places and public buildings, places of amusement and eating places, vacant lots or any unsupervised place between the hours of ten p.m. and daylight immediately following; provided, however, that the provisions of this section do not apply when the minor is accompanied by his or her parents, guardian or other adult person having the care and custody of the minor, or when the minor is upon an emergency errand directed by his or her parent or guardian or other adult person having the care and custody of the minor or when the minor is returning directly home from a meeting, entertainment, recreational activity or dance.

Id. at 117 (quoting SACRAMENTO, CAL., ORDINANCE 355, § 1 (1949)).

145. *Id.* at 120. The court noted that although the curfew ordinance in this case was broader than the loitering ordinance in *Walton*, it still qualified as a loitering type curfew ordinance "because the words taken together and used in their ordinary sense prohibit tarrying and remaining in place and not merely being present." *Id.*

146. *See id.* "[I]t has been specifically held that curfew regulation of minors is [a] reasonable classification." *Id.*

147. *Id.*

California case law on juvenile curfews thus consists of three cases spanning a period of twenty-seven years, none of which have been decided in the last two decades. Of the three cases, each has narrowed its review to the specific determination of the constitutionality of the ordinance at issue, rather than broaching the decisive question of the constitutionality of juvenile curfews in general. Furthermore, the courts have avoided considering the due process implications clearly created by blanket juvenile curfews. By steering clear of any potential analysis of the infringement of fundamental rights implicit in juvenile curfews, the courts have avoided applying the decidedly more stringent strict scrutiny analysis in any of the three cases. Instead the courts have married their juvenile curfew analysis to the rational basis test, and focused on the type of curfew involved and the exceptions made. These relatively minor requirements for what will constitute an acceptable juvenile curfew in California have enabled a lack of stringent compliance with the constitutional rights of juveniles. Because this limitation on the scope of juvenile rights has added to the deluge of curfews recently passed throughout the state, California courts will inevitably be faced with the question of the general constitutionality of blanket juvenile curfews.

IV. The Best Direction for California Law: A Modest Proposal

No California court has ruled on the constitutionality of a municipally imposed juvenile curfew ordinance for twenty-five years.¹⁴⁸ In 1995, the California Supreme Court granted review of *In re Daniel W.* and it appeared that the court was prepared to break its silence with a definitive statement on the status of juvenile curfews in California.¹⁴⁹ Regrettably, the eagerly awaited decision was thwarted by a technicality, the case was dismissed, and the appellate court opinion was ordered depublished.¹⁵⁰ When the court finally does address the general constitutionality of municipally imposed juvenile curfews, it will be approaching the issue with a relatively clean slate. California case law consists exclusively of three cases which are not binding upon the California Supreme Court. The decisions of other state supreme courts and federal courts are merely persuasive authority, and the United States Supreme Court has not specifically ruled on the general consti-

148. A later case, *In re Frank O.*, 247 Cal. Rptr. 655 (Cal. Ct. App. 1988), was ordered depublished by the California Supreme Court in 1988.

149. See *supra* notes 5-6 and accompanying text.

150. See *supra* note 2.

tutionality of blanket juvenile curfews. Thus, the status of current law has placed California in an enviable and exciting position.

With the opportunity to survey the constitutional landscape before ruling on the general constitutionality of juvenile curfews, unencumbered by precedent and in light of current commentary on children's rights and statistics on the effectiveness of curfews in controlling juvenile crime, California can potentially shape modern legal thought and application of the scope of juveniles' rights under the Constitution. The history of curfews and the current eclectic approach to juvenile curfews in the United States suggest that many state courts have been awaiting direction from the Supreme Court; unfortunately, no solution appears to be on the horizon. In the interim, however, California need not be resigned to conducting business as usual, but can endeavor to address the competing concerns on both sides of the juvenile curfew debate. The key lies in looking beyond the municipalities to the juvenile court system.

A. Goals

It is possible to impose juvenile curfews while recognizing the rights of minors without disregarding characteristics that distinguish youth from adults. As a threshold issue, municipalities that impose juvenile curfew ordinances must recognize that competing interests are at stake. On the one hand, there is a compelling need to provide guidance for children, to protect them from criminal victimization, and to induce them not to engage in criminal activity.¹⁵¹ On the other hand, children who are constantly berated for their youth and treated as second-class citizens are not likely to experience an epiphany on their eighteenth birthday that this unequal treatment was for their own good.¹⁵² The goal, then, is to strike an acceptable balance be-

151. See *supra* notes 20-23 and accompanying text. See also *Qutb v. Strauss*, 11 F.3d 488, 492 (1993) (recognizing the government interest in "reduc[ing] juvenile crime and victimization, while promoting juvenile safety and well-being").

152. Tona Trollinger argues that juvenile curfews are constitutionally intolerable infringements on procedural and substantive due process that give officers wide authority to stop and question all youths appearing in public places at night. See Trollinger, *supra* note 7, at 950-51. Trollinger argues that curfews are ineffective to accomplish their stated purpose and problematic in the way they treat youth:

That a curfew will deter criminal activity when extant criminal laws with penalties considerably more severe are ineffective is a strong assumption. . . . The curfew strikes an exacting blow on law-abiding youths. It addresses a crime problem as if it were a youth problem. It presumes youths to be guilty and conveniently ignores the voices of the disenfranchised. It penalizes juveniles less for their action than for their status, and alienates them from police.

Id. at 965-66 (citations omitted).

tween providing guidance to minors and limiting the extent of socially detrimental, and arguably unconstitutional, government intrusion.

B. Method

Relocating the point of implementation of juvenile curfews from municipalities to the juvenile court system is a workable alternative that will insure that juvenile curfews meet the goals of providing guidance, protecting minors, and preventing crime, while at the same time limiting the extent of government intrusion. Currently, the California Welfare and Institutions Code extends jurisdiction of the juvenile courts to curfew violators.¹⁵³ The Code also allows for imposition of curfews as a condition of release and probation.¹⁵⁴ Finally, the Code provides a means of financing the enforcement of juvenile curfews.¹⁵⁵ Thus, the structure necessary to implement curfews as mandatory conditions of probation through the juvenile court system is already in place.

Incorporating a curfew as a condition to probation would end the necessity for municipally imposed juvenile curfews, thus relieving cities, towns, and counties of the burden of creating sufficiently clear, reasonable, narrowly tailored ordinances.¹⁵⁶ Through this method, lawmakers can construct an equitable balance between the goals of juvenile curfews and the constitutional rights of minors by restricting the application of curfews to cover only those juveniles who have demonstrated a propensity to violate the law.¹⁵⁷ Juveniles who have not violated the law would thus maintain full constitutional protection

153. "Any person under the age of 18 years . . . when he or she violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court." CAL. WELF. & INST. CODE § 601(a) (West Supp. 1996).

154. "As a condition for such release, the probation officer shall require the minor to sign a written promise that he understands and will observe the specific conditions of home supervision release. Such conditions may include curfew . . ." *Id.* § 628.1 (West 1984).

155. *See id.* § 625.5(e) (West Supp. 1996).

156. An example of a statute mandating curfew as a condition of probation can be found in Florida where a curfew is authorized "as a penalty component of community control." FLA. STAT. chs. 39.053-.054 (1996). Accordingly, as the Florida Supreme Court recently held, "a condition of probation which is statutorily authorized or mandated . . . may be imposed and included in a written order of probation even if not orally pronounced at sentencing." *State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996). The court affirmed this holding in a recent case where neither the condition of a curfew nor the time was orally announced at the juvenile's hearing. *A.B.C. v. Florida*, No. 88, 182, 1996 Fla. LEXIS 1878, at *1, *4 (Fla. Nov. 7, 1996).

157. *See* LAWRENCE D. HOULGATE, *THE CHILD AND THE STATE* 109-10 (1980) (suggesting that once juvenile offenders have manifested an inability to conduct themselves in public, the juvenile court could impose a curfew).

from blanket curfews.¹⁵⁸ Removing the use of juvenile curfews from the local level to the juvenile court system would also effectively satisfy the government interest in protecting minors, society's interests in preventing crime and mischief, and minors' interests in complete possession of the entire scope of rights guaranteed under the constitution.¹⁵⁹

V. Conclusion

Determining the constitutionality of juvenile curfews involves a continuing debate regarding the status of minors under the Constitution. Many have argued that minors' constitutional rights may be restricted because of their immaturity and inherent incapacity to protect themselves and use good judgment. Others stress that any differences between minors and adults cannot mean that minors are entitled to lesser constitutional rights.

It is evident that courts across the country are searching for guidance on the general constitutionality of municipally imposed juvenile curfews. Many courts have chosen to implement any rationale remotely applicable to juvenile curfews. While not all recent cases have used the *Bellotti* factors to justify restricting minors' constitutional rights, many courts have done so in order to avoid a strict scrutiny analysis. Other courts have avoided ruling on the scope of juveniles' constitutional rights by failing to acknowledge the infringement of a fundamental right or to apply a strict scrutiny analysis, choosing in-

158. Logically, a general juvenile curfew intended to prevent crime will have little effect on juveniles who intend to break the law—the threat of spending a night in a detention center is far inferior to the possible consequences of committing a crime. Thus, a juvenile curfew will only have meaning when applied to those already inclined to obey the law. See *Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989).

159. For a discussion of the potential problems with enforcement of such a curfew condition, see *In re Tyrell J.*, 876 P.2d 519, 529 (Cal. 1994) (holding that a minor who was subject to a condition of probation requiring him to submit to warrantless searches by any law enforcement officer had no reasonable expectation of privacy, and that officer's lack of knowledge of the minor's search condition was therefore irrelevant). See also Kristin Anne Joyce, Comment, *Fourth Amendment Protections for the Juvenile Probationer After In re Tyrell J.*, 36 SANTA CLARA L. REV. 865, 898 (1996) (arguing that the admission of evidence obtained during a warrantless search of a probationer under a search condition is inconsistent with the Fourth Amendment); Shelley Davis, Note, *In re Tyrell J.: Children and Their Reasonable Expectations of Privacy*, 25 GOLDEN GATE U. L. REV. 391, 414 (1995) (arguing that the California Supreme Court's removal of the requirement that the officer have prior knowledge of the minor's probationary search condition before conducting a warrantless search strays from Fourth Amendment jurisprudence, broadens the requirement of reasonable belief, and contravenes the purpose of rehabilitation through the juvenile justice system).

stead to apply rational basis review to a challenge of overbreadth or vagueness. California courts have taken the latter approach.

Although these holdings potentially aid municipalities in crafting curfews which are rationally related to the government's purpose, the appropriateness of the government purpose and the infringement on fundamental constitutional rights have not been addressed. However, as juvenile curfews grow in popularity, and imposition across the state and across the nation increases, California courts are bound to be presented once again with the opportunity to define the status of juvenile curfew law.

Meanwhile, a potential solution for California municipalities seeking to enact juvenile curfews is available. By imposing curfews as a condition of probation through the Welfare and Institutions Code, the competing interests of the courts, the public, parents, and minors can be effectively addressed. Curfew conditions would ameliorate societal concerns regarding protection of minors and reduction of juvenile crime while also preserving the full constitutional rights of minors who have not violated the law. Juvenile curfews structured by the California Legislature, implemented by the juvenile courts, and enforced by police officers in a conscientious manner would alleviate the burden on California municipalities, which must now guess at the constitutional requirements in drafting such ordinances. Although imposing a curfew condition on probationers does not answer the question of the general constitutionality of juvenile curfews, it may provide the most practical solution among the plethora of competing interests.